91-1701

No. ———

Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS COSTELLO, and
SUSAN TUCKERMAN COSTELLO,
Petitioners,

v.

YVONNE B. JANSON, ADMINISTRATRIX
ESTATE OF ALMA MONTOUR, and
PATRICK J. MURPHY, *et ux,*
Respondents.

Petition for Writ of Certiorari to the Appeals Court of Massachusetts

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a court strike the appearance of any person appearing for themselves, alone, with prejudice, based only on their not being an attorney?

2. Is any sale for less than the highest bid, under a probate court license to sell, fraudulent and void; and with less than the highest bid, may any court allow Murphy to divest Thomas Costello, or any other person, of their title to real property, under such a license to sell, where there is a specific court order for bids, and where the highest bid was made by Susan Tuckerman Costello and where her claim to title was then adjudicated against her, without notice of her being afforded an opportunity to be heard?

3. Will this Supreme Court correct a growing and now overt prejudice against *pro se* litigants manifested by the above judgments, to the extent that the probate court has denied Costello's claim to the proceeds of the sale of his property?

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Petition for Writ of Certiorari to the Appeals Court of Massachusetts

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Thomas Costello and Susan Tuckerman Costello, respectfully pray that a writ of certiorari issue to review the summary disposition judgment by the Massachusetts Appeals Court dated January 16, 1992 together with the judgment ultimately entered in this proceeding on February 26, 1992 by the Massachusetts Supreme Judicial Court denying further appellate review.

OPINIONS BELOW

The summary disposition judgment by the Massachusetts Appeals Court, reported at Massachusetts Appeals Court Advance Sheets (1992) 32, appears in the ap-

pendix hereto (App. 2a). The order of the Massachusetts Supreme Judicial Court denying the petitioners application for further appellate review, reported at Massachusetts Advance Sheets (1992) 412, appears in the appendix hereto (App. 1a).

The unreported judgment dismissing the appearance of Thomas Costello, with prejudice, on the sole grounds that he is not an attorney (App. 3a), and the summary judgment of the Massachusetts Bristol County Probate and Family Court ratifying a sale of real property, under a license to sell, and a court order for bids, to other than the highest bidder, without notice an opportunity to be heard in court, also appear in the appendix (App. 5a).

JURISDICTION

The summary disposition judgment of the Massachusetts Appeals Court was entered on January 16, 1992; the petition for further appellate review to the Massachusetts Supreme Judicial Court was denied on February 26, 1992 and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Supreme Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV, Section 1:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On July 16, 1986, Yvonne B. Janson, the administratrix (administratrix) by and through her attorney, Preston H. Hood, Jr. (Hood) petitioned the Massachusetts Bristol County Probate and Family Court Depart-

ment of the Trial Court (court), for an intestate administration of the estate of Alma Montour (App. 6a). Hood and the administratrix represented to the court that Alma Montour died intestate leaving eleven (11) heirs or five (5) equally sharing groups of heirs. The only asset of the estate is a 1/7th interest in real estate and there were no creditors. The petition for an intestate administration was allowed and a decree entered accordingly (App. 7a). There was never a final accounting; nor is there a final decree of distribution in this estate.

The administratrix, through Hood, applied for a license to sell the 1/7th interest in real estate for $10,000.00 on July 7, 1987 stating in the application for a license to sell that $10,000.00 was an "advantageous offer". The court citation for the license to sell was advertised in the local newspaper, as required by statute.

Costello read the citation for a license to sell in the newspaper and knew that this application for a license to sell was fraudulent because Susan Tuckerman Costello had already *initially* offered both the administratrix and her attorney, Hood, $15,000.00 for the 1/7th interest in the real estate. Costello filed a timely written objection to the license to sell for $10,000.00, with a supporting affidavit, stating that the application was fraudulent because Costello had already made an *initial* offer of $15,000.00 for this 1/7th interest in the real estate.

After the hearing on Costello's objection to a license to sell for $10,000.00, the court issued the license to sell for "*not less than $15,000.00*" and, also, simultaneously entered an order on December 4, 1987: "*Administratrix and Counsel to notify Susan Tuckerman Costello to submit bid or offer*" (App. 37a).

Meanwhile, Hood, who was also surreptitiously representing Patrick J. Murphy and Pamela A. Murphy, (Murphy) (App. 40a), was soliciting deeds from the heirs of this and other estates that Hood was also representing, for the benefit of Murphy. Attorney Hood

went on to bring a probate court petition for partition against Thomas Costello on October 20, 1988, representing Murphy for other related 1/7th interests in this real estate (App. 41a) which partition action was based on Murphy's acquisition of shares for less than Costello's higher bids.

Thomas Costello was also soliciting deeds from heirs and Harvey B. Montour, an heir of the estate of Alma Montour sold his 1/20th interest in the estate of Alma Montour (App. 6a) to Costello for $5,000.00 on March 30, 1988 by a good and sufficient duly recorded warranty deed (App. 8a). Ultimately, Costello purchased a 3/5th interest of the heirs of the estate of Alma Montour for $68,500.00; and other 1/7th interests in this real estate totaling a 3/7th total interest for $205,000.00 (App. 41a).

The court ordered bidding began with a telephone call to Susan Tuckerman Costello from Attorney Hood stating that Hood had a bid for $16,000.00. On January 26, 1988, Costello, by certified letter, return receipt, to both Hood and the administratrix, bid $17,000.00 (App. 11a). Hood telephoned Costello again on February 13, 1988, stating that he had a bid for $18,000.00. On February 15, 1988, Costello, by certified letter, return receipt, informed both Hood and the administratrix that if they had such a bid of $17,000.00 then they were to so state in writing and Costello would "better that offer" (App. 13a).

On March 2, 1988, Attorney Joseph E. Hanify, Jr. (Hanify) a local politician, elected Bristol County Register of Deeds, and an associate of Hood, by certified letter, return receipt, notified Costello that there was an offer of $18,000.00 (App. 14a).

On March 5, 1988, the very next day after receiving the certified letter from Hanify, Costello bid $19,000.00, by certified letter, return receipt, to both Hood, the sole attorney of record, and the administratrix (App. 15a).

On March 3, 1988, Hanify went to the ninety-two year old administratrix who had less than a high school education and she executed a deed in blank and Hanify took the acknowledgement of the administratrix on this blank deed, as a notary public, stating, thereon, that the execution of the deed was her "free act and deed, before me" (App. 17a).

Later, Attorney Hood, without an instrument under seal authorizing him to do so, filled in the blank deed after it was executed by the administratrix and notarized by Hanify; and Hood, by himself, without Murphy or anyone representing Murphy present, recorded the deed with the Bristol County Registry of Deeds with Murphy as the grantee for $18,000.00 on April 13, 1988 (App. 18a); notwithstanding the court order for bids from Susan Tuckerman Costello and her higher bid of $19,000.00. Hood stated that he was not representing Murphy when he recorded the deed to Murphy and no one representing Murphy accepted tender or perfected delivery of the deed to Murphy at the registry of deeds (App. 39a-40a).

Thomas Costello, an owner of a 3/5th share of the 1/7th interest in the real estate out of the estate of Alma Montour, was divested of his 3/5th interest in the real estate he had purchased from the heirs of the estate of Alma Montour for less than the highest probate court ordered bid.

Susan Tuckerman Costello clearly had the highest bid; yet, lost the bid and title to Murphy.

Now, Hood and Hanify wanted the probate court to ratify and confirm their wrong doing, so Hanify crafted and filed an equity complaint in the court on February 24, 1989 pursuant to Mass.G.L. c. 204, Section 24 and Mass.G.L. c. 230, Section 5, and Mass.G.L. c. 215, Section 6, which complaint was verified by the administratrix of the estate of Alma Montour (App. 19a-20a). In this verified complaint, the administratrix swore, under oath, that Murphy was timely out bid by Susan Tuckerman Costello

and that the deed was "given" to Murphy by mistake. Only, Hanify named just Murphy as a respondent in the caption of the complaint. Susan Tuckerman Costello was named in the body of the verified complaint as the timely and highest bidder. The court issued citation (App. 21a) required, by its very own terms, service of the citation on "all interested parties".

Hood served the citation on Thomas Costello (App. 23a) and Susan Tuckerman Costello (App. 24a); and Hanify made the return of service on Murphy, Thomas Costello and Susan Tuckerman Costello with the court on March 3, 1989 (App. 22a, 23a, 24a, 26a), by filing with the court Hood's United States Postal Service return receipt.

Once served with a citation, a decree *pro confesso* would enter against all who were served with the citation and failed to respond within the time set forth in the citation.

Prior to the return day, the respondents: Thomas Costello and Susan Tuckerman Costello filed an appearance, *individually*, April 10, 1989 (App. 27a, 28a) as required by the clear and unequivocal terms of the citation (App. 21a-22a); Thomas Costello and Susan Tuckerman Costello answered the verified complaint and filed a counterclaim against the administratrix and brought a third-party complaint against Hood, Hanify and others on April 10, 1989 (App. 26a).

The other respondent, Murphy, answered the verified complaint on April 24, 1989 (App. 29a) admitting that Murphy was out bid by Costello; but there was one (1) prayer in Murphy's answer that Murphy be allowed to match Costello's higher bid of $19,000.00 and for Murphy to keep title even though Murphy, by doing so, would still not have won the bid ordered by the court. Murphy did not raise nor did Murphy file any defenses, affirmative or otherwise, prior to or with Murphy's answer.

The third-party defendants, Hood and Hanify, who were never served with a citation (the court would not

issue a third-party citation to Costello), moved via a written motion, that "*the appearance of Thomas Costello and any and all pleadings that he may have filed be ordered stricken from the record on the grounds that he is not an attorney*" (App. 3a). LaStaiti, J. allowed the motion to strike the appearance of Thomas Costello, "*with prejudice*", on June 19, 1989 (App. 3a).

Thomas Costello duly and timely noticed an appeal of this final judgment on June 22, 1989 (App. 31a).

Then, LaStaiti, J. solicited from Murphy, a motion to dismiss the verified complaint for failure to state a claim upon which relief may be granted stating that such a motion would be allowed when filed, even though Murphy had already answered the verified complaint and prayed for relief. Murphy filed such a motion (App. 4a), without service on either Thomas Costello or Susan Tuckerman Costello (App. 4a) even though Susan Tuckerman Costello still had an appearance, answer, and counterclaim, filed in this action and had a stake in the outcome. No affidavit was filed by Murphy in support of the motion to dismiss. The only evidence that was ever before the court is the verified complaint.

Susan Tuckerman Costello was not served with Murphy's motion to dismiss (App. 4a) and she was not given notice of the hearing by the court and was, therefore, not afforded an opportunity to be heard in opposition to the motion to dismiss and had no prior notice of the conversion of the motion to dismiss to a motion for summary judgment. No matters outside the pleadings were presented to the court, at the hearing on Murphy's motion to dismiss, within the meaning of Mass.R.C.P. 12(b)(6), which tracks the Federal Rule of Civil Procedure.

Later, after oral argument, LaStaiti, J., *sua sponte*, converted the Mass.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim to a Mass.R.Civ.P. 56 motion for summary judgment and found for Murphy (App. 4a). Judgment entered on July 21, 1989 for Murphy

(App. 5a) ratifying and confirming the conveyance to Murphy for less than the court ordered highest bid *without* the administratrix or her counsel opposing Murphy's motion for judgment against the administratrix and without Susan Tuckerman being given notice and afforded an opportunity to be heard in opposition.

Thomas Costello (App. 33a) and Susan Tuckerman Costello (App. 34a) duly and timely noticed an appeal from the final judgment of July 21, 1989 on July 28, 1989.

The Massachusetts Appeals Court summarily affirmed all of the probate court judgments against Thomas Costello and Susan Tuckerman Costello on January 16, 1992 (App. 2a), assessing double costs.

Costello petitioned the Massachusetts Supreme Judicial Court for further appellate review on January 31, 1992. The petition for further appellate review was denied on February 26, 1992 (App. 1a).

On March 16, 1992, Costello petitioned the probate court to obtain his share of the actual monetary proceeds of the sale of his interests in the real estate which were conveyed to Murphy and Costello's motion was summarily denied (App. 35a).

REASONS FOR GRANTING THE WRIT

I. NO COURT MAY STRIKE THE APPEARANCE OF ANY PERSON APPEARING FOR THEMSELVES, ALONE, WITH PREJUDICE, BASED ONLY ON THEIR NOT BEING AN ATTORNEY.

Thomas Costello has an absolute right to appear in court representing himself. The case cited by the third-party defendants, Hood and Hanify, in their motion to strike Costello's apearance, is one in which a person who was not an attorney, attempted to wrongfully and improperly represent a corporation. The case is correct in what it stands for, but does not apply to the facts of this case. Thomas Costello always represented himself, alone,

as an individual (App. 26a, 28a). It is of the essence of the administration of justice that an individual can not be deprived of a right to be heard by action of the probate court without any default on their own. *Dolan v. Roy*, 286 Mass. 519, 521 (1934). A decree of the probate court should be vacated if it deprived an interested party of their day in court or of their opportunity to litigate an issue claimed to have been adjudicated by decree. *O'Brien v. Dwight*, 363 Mass. 256, 287 (1973). Individuals have a constitutional right to defend themselves and their property without being an attorney.

The Massachusetts equity probate practice and procedure is arcane, *strictissimus juris*; but certainly not dysnomous and Costello complied in every conceivable manner.

Mass.G.L. c. 202, Section 19, clearly and unequivocally provides:

> *Distribution, sale of realty; procedure*:
>
> ". . . persons known to him as having or claiming any interest in said real estate derived from any deed of conveyance or mortgage by, through or under any of the heirs or devisees, and if it appears that there are any such persons, they shall be made parties to the proceedings and notified in such manner as the court orders."

Thomas Costello has standing by operation of statute.

However, pursuant to Mass.G.L. c. 204, Section 24:

> ". . . but no act or proceeding shall be ratified or confirmed which the court might not have passed or authorized in the first instance upon due proceedings."

No court can ratify and confirm a conveyance under a license to sell, for less than the court ordered highest bid, because no court could allow this type of fraudulent conduct, in the first instance.

The rule in Massachusetts is that title to realty of a deceased intestate vests in the heirs at the moment of death in proportion to their vested interests, and requires no distribution. *Lynde v. Vose*, 326 Mass. 621, 623 (1951); 2 Newhall, "Settlement of Estates", Section 26 (4th edition 1958 & Supp. 1992); Riley, "Estate Administration", Section 13 at 58 (1989); "Massachusetts Probate Manual", c. 9 at 25 (4th ed. MCLE 1988); *Russo v. Inzirillo*, 360 Mass. 862, 863 (1971); *Roper v. Murphy*, 317 Mass. 176, 178 (1944).

Costello relied on the decree of the court allowing an intestate administration, i.e., that Alma Montour died intestate and that the heirs held title to a 1/7th interest in real estate, as tenants in common in proportion to the respective interest (App. 6a, 41a).

Accordingly, and relying on the probate court intestate decree of administration, Costello purchased a 1/20 interest of an heir of Alma Montour on March 30, 1988 (App. 8a). Costello went on to purchase a total of 3/5ths interest from the heirs of Alma Montour (App. 41a).

When the decree of intestate administration entered it had the effect of adjudicating that from the moment of death of Alma Montour, the heirs held title, in common, in proportion to their respective interests. An heir has the right, at any time after the death of an intestate, to mortgage, sell, or assign their distributive share. 2 Newhall, "Settlement of Estates", Section 251, *supra*.

The title, by warranty deed, that Thomas Costello obtained from the heirs (App. 8a, 41a) was defeasible by operation of the probate court license to sell, if there was compliance with the court order for bids and title went to the highest bidder for the highest bid. The purpose of a license to sell is to convert realty to an equivalent amount of cash.

Therefore, Costello held title to a share which Hood, Hanify, and Murphy sought to fraudulently divest for

less than the highest bid under a court license to sell which specifically ordered bids from Susan Tuckerman Costello (App. 37a).

Where Thomas Costello held record title by warranty deeds, he certainly has standing to object to an equity petition seeking to ratify and confirm a sale to Murphy of Costello's title, for less than highest bid. Susan Tuckerman Costello has standing to object to the confirmation and ratification of a conveyance to Murphy when she is the acknowledged high bidder by both affirmation by the administratrix as set forth in the verified complaint (App. 20a) and by Murphy in his unequivocal answer to the verified complaint (App. 29a). Costello suggests that Murphy took title without paying fair consideration and, if anything, became a trustee for Costello. Scott, "Law of Trusts", Sections: 508, 517.2 (1960).

Costello suggests that Murphy, Hood, Hanify, and the administratrix are in contempt of the court order for bidding, which order was never altered, amended, or rescinded. Hood never notified his client, the administratrix, of this court order for bids (App. 37a-38a).

Thomas Costello has standing, he held title by warranty deeds that Murphy, Hood, and Hanify sought to fraudulently take without paying fair consideration, and in contempt of the court order for bids. Susan Tuckerman Costello was denied: notice, and an opportunity to be heard in court, equal protection under the law, and due process.

The return of service made by Hanify with the court, on Thomas Costello and Susan Tuckerman Costello, constitutes a representation of fact and law that the proper persons have been served in the proper manner. "Massachusetts Probate Manual" c. 12 at 9 (4th ed. MCLE 1988).

It is the general and well settled principle of equity procedure that all persons whose rights are to be af-

fected, legally or beneficially, by a final decree, must be made parties to an action so that there may be a complete decree binding them all.

II. ANY SALE FOR LESS THAN THE HIGHEST BID, UNDER A PROBATE COURT LICENSE TO SELL, IS FRAUDULENT AND VOID, AND WITH LESS THAN THE HIGHEST BID, NO COURT MAY ALLOW MURPHY TO DIVEST THOMAS COSTELLO, OR ANY OTHER PERSON, OF THEIR TITLE TO REAL PROPERTY, UNDER SUCH A LICENSE TO SELL, ESPECIALLY WHERE THERE IS A SPECIFIC COURT ORDER FOR BIDS, AND WHERE THE HIGHEST BID WAS MADE BY SUSAN TUCKERMAN COSTELLO AND WHERE HER CLAIM TO TITLE WAS THEN ADJUDICATED AGAINST HER WITHOUT NOTICE OR HER BEING AFFORDED AN OPPORTUNITY TO BE HEARD.

An administratrix has a plain *duty* to obtain the highest possible price for real estate under a license to sell. *Thornton v. McWalter*, 329 Mass. 768, 769 (1953). *Lagasse v. Lagasse*, 20 Mass.App.Ct. 911 (1985).

An administratrix selling under a license to sell, has the power to sell but no title. *Denault v. Cadorette*, 298 Mass. 67, 69 (1937). Here, the duty and the power need not be distinguished because there was no purchase and sale agreement within the meaning of *Onanian v. Leggat*, 2 Mass.App.Ct. 623 (1974).

Costello submits that the administratrix can not sell real property in an estate for less than the highest bid, under a license, and such a conveyance would be fraudulent and void; *Hunt v. Frost*, 2 Cushing (58 Mass.) 54, 59 (1849) quoted in *Onanian v. Leggat*, 2 Mass.App.Ct. 623, 626 (1974); however, here the power of the administratrix is constrained by the court order for bids. The administratrix could only sell to the highest bidder for the highest bid. The administratrix was duty bound to report higher bids to the court; but, did not. *Grennan v. Pierce*, 229 Mass. 292, 293 (1918).

Murphy did not serve Susan Tuckerman Costello with the motion to dismiss (App. 4a) and the court refused to give Susan Tuckerman Costello notice of the hearing and an opportunity to be heard when her claims to title as highest bidder were being adjudicated against her.

Murphy could not be seen as a good faith purchaser for value with the protection afforded under Mass.G.L. c. 192, Section 3, the account was not settled; when and where, on the same day Murphy obtained two (2) other identical in description deeds, each for a 1/7th interest for $10,000.00 each, with the fraudulent inside dealing and aid of Attorney Hood and again for less than the highest bid from Costello, but without the specific court order for bids in this other estate (App. 38a-39a, 41a).

For yet another 1/7th share, on the recommendation of the Massachusetts Board of Bar Overseers, a single justice of the Massachusetts Supreme Judicial Court suspended an attorney from the practice of law, for conveying this another 1/7th interest to Murphy with a recorded forged license to sell, for less than Costello's highest bid. Incredibly, the probate court, on a later petition by Murphy, ratified this other conveyance to Murphy which was based on a recorded forged license to sell, for less than the highest bid from Costello (App. 41a).

A deed under a license to sell comes without any covenants such as quitclaim or warranty and a grantee takes such a deed pursuant to a court license to sell under the rule of *caveat emptor*. *Tyndale v. Stanwood*, 182 Mass. 534, 537 (1903) (App. 13a). Costello suggests that Murphy took nothing from either the administratrix, the estate of Alma Montour, the heirs, or Thomas Costello.

It *was* long standing law in Massachusetts that a sale for less than the highest bid is fraudulant and void.

Now, it is the established case law in Massachusetts that litigant can not represent themselves, individually; and a person can be divested of title to real property,

under a license to sell, for less than the highest probate court ordered bid; and an unsuccessful low bidder need only match the high bidder to take title, and the rights of a party may be adjudicated against them without notice or an opportunity to be heard in court. This is clearly wrong, reversible error, and can not be let stand as the new law of the land in the Commonwealth of Massachusetts.

III. THE DECISIONS BELOW RAISE IMPORTANT CONSTITUTIONAL ISSUES REGARDING A GROWING AND NOW OVERT PREJUDICE AGAINST *PRO SE* LITIGANTS MANIFESTED BY THE ABOVE JUDGMENTS TO THE EXTENT THAT THE COURT HAS DENIED THOMAS COSTELLO'S CLAIM TO THE PROCEEDS OF THE SALE OF HIS PROPERTY.

This Supreme Court can not allow, and the highest court of Massachusetts can not be seen as establishing a very dangerous precedent of affirming the dismissal of an appearance of an individual because they are not an attorney; further, authorizing the taking of real property for less than fair consideration, without due process of law and without equal protection under the law; and awarding title to an unsuccessful bidder who would only offer to match the highest bid.

There is a pervasive and growing prejudice against persons representing themselves in court and like any other covert practice which is practiced long enough with impunity, it has now become overt. The system, more often than not, will properly and openly help and seek to protect an incompetent attorney only to hold persons representing themselves to a much higher and stricter standard than the most qualified, astute, and erudite attorney. In contrast, the system has been giving *pro se* litigants a subliminal message which is now become overt and that message is now loud and clear, that we do not

want you here if you are going to be here without an attorney. It is unconscionable that, in the end, Thomas Costello would also be denied the proceeds of the sale of his interest in real property to Murphy (App. 35a).

The question is, will this Supreme Court condone or resupinate this unacceptable, growing practice and thoroughly repugnant attitude. Here, the system knew the message it wanted to give Costello; but forgot about the United States Constitution in their struthious quest.

CONCLUSION

For all of the above reasons, a writ of certiorari should issue to review the judgment by the Massachusetts Appeals Court affirming the probate court judgments.

In the alternative, a summary remand should issue to the lower court with an order that:

1. no court may strike the appearance of any person appearing for themselves, alone, based only on their not being an attorney; and

2. any owner of an interest in real property and any bidder for those interests, operating under a probate court license to sell, have standing in the proceedings and a stake in the outcome; and both the owner and the bidder are entitled to notice and an opportunity to be heard in court; and

3. any sale for less than the highest bid, pursuant to a probate court license to sell, is fraudulent and void, *ab initio.*

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

Office of the Clerk
1412 Court House, Boston MA 02108
(617) 725-8055

FAR-6003 Feb. 27, 1992

YVONNE B. JANSCN, administratrix

vs.

PATRICK J. MURPHY, & another

The above-captioned Application for Further Appellate Review is

DENIED

JEAN M. KENNETT
Clerk

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT FOR THE COMMONWEALTH
AT BOSTON

January 16, 1992

IN THE CASE OF YVONNE B. JANSON, administratrix

vs.

PATRICK J. MURPHY & another
(and a companion case),

pending in the Probate & Family Court for the County of Bristol.

ORDERED, that the following entry be made in the docket; viz.,—

Judgment affirmed.

Double costs to the appellees, Patrick J. and Pamela A. Murphy.

BY THE COURT,

/s/ Nancy Tuck Foley
Clerk

January 16, 1992

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT

BRISTOL, SS.

No. 89E0019-G1

YVONNE B. JANSON, ADMX.

v.

PATRICK J. MURPHY and PAMELA A. MURPHY

MOTION TO STRIKE APPEARANCE
OF THOMAS F. COSTELLO

[Filed May 30, 1989]

Now come Attorneys Preston Hood, Jr. and Joseph E. Hanify, Jr., and move that the appearance of Thomas F. Costello and any and all pleadings that he may have filed be ordered stricken from the record on the grounds that he is not an attorney. See *Varney Enterprises, Inc.* v. *WMF, Inc.*, 402 Mass. 79, April 6, 1988. (See copy attached.)

By their attorneys,
CHARLES R. DESMARAIS, P. C.

By /s/ Charles R. Desmarais
CHARLES R. DESMARAIS
446 County Street
New Bedford, MA 02740
508 999-2341
May 26, 1989

June 19, 1989
After hearing
Motion allowed
with prejudice

/s/ Elizabeth O'Neill LaStaiti
Judge of Probate & Family Court

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT

BRISTOL, ss.

Equity No. 89E0019G1

YVONNE B. JANSON, ADMINISTRATRIX,
Plaintiff

vs.

PATRICK J. MURPHY AND PAMELA A. MURPHY,
Defendants

MOTION TO DISMISS

[Filed June 16, 1989]

Now comes the Defendants in the above entitled matter and move that this Court dismiss this matter for failure of the Plaintiff to state a claim upon which relief can be granted.

[July 21, 1989—After hearing the Court treating this Motion as a Motion for Summary Judgment (M.R.C.P. Rule 56) and there being no genuine issue as to any material facts, the Court finds that the defendants are entitled to a judgment as a matter of law.]

/s/ Elizabeth O'Neill LaStaiti
Judge of Probate & Family Court

CERTIFICATE OF SERVICE

I, Benjamin M. Gottlieb, on oath depose and say that I have served a copy of the within motion, postage prepaid on Attorney Joseph E. Hanify, Jr., 10 Purchase Street, Fall Riuver, Massachusetts on this 15th. day of June, 1989.

/s/ Benjamin M. Gottlieb
BENJAMIN M. GOTTLIEB

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT

BRISTOL, ss.

No. 89E0019-G1

YVONNE B. JANSON,
Plaintiff(s)

v.

PATRICK J. MURPHY AND PAMELA A. MURPHY,
Defendant(s)

JUDGMENT

This action came on (hearing) before the court, La-Staiti, J. presiding, and the issues having been duly (tried)

After hearing It is Ordered and Adjudged: In accordance with the motion acted on on July 21, 1989 Judgment is to issue in favor of the defendants.

Date July 21, 1989

Entered: July 21, 1989

/s/ Elizabeth O'Neill LaStaiti
Judge of Probate Court

/s/ J. Paul Galante, Jr.
Assistant Register

COMMONWEALTH OF MASSACHUSETTS

TO THE PROBATE COURT:
in this commonwealth

ADMINISTRATION/WITH SURETIES

BRISTOL ss.

Docket No. 86P1308-A1

Name of Decedent Alma Montour

Domicile at Death 495 MAMMOTH RD.
(street and no.)

MANCHESTER, NEW HAMPSHIRE

(city or town) (county)

Date of Death April 30, 1979

Name and address of Petitioner Yvonne B. Janson of 22 Norwood Street, Fall River, Massachusetts

Status Sister

Heirs at law or next of kin of deceased:

Name	Residence	Relationship
(minors and incompetents must be so designated)		
Yvonne B. Janson	Fall River, MA	Sister
Jeannette Mello	Swansea, MA	Niece
Harvey B. Montour, Jr.	Tiverton, RI	Nephew
Juliette Paradise	Fall River, MA	Niece
Arthur E. Montour	Brockton, MA	Nephew
Leonette Theroux	Somerset, MA	Niece
Stuart D. Montour	Narraganset, RI	Nephew
Joseph Montour	Houston, TX	Nephew
Robert N. Montour	Somerset, MA	Nephew
Roland J. Montour	E. Freetown, MA	Nephew
Reney Montour	Tiverton, RI	Nephew

Dated July 14, 1986

Signature Yvonne B. Janson

The undersigned hereby assent to the foregoing petition.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

DECREE

It appearing that the petitioner is one of the heirs of said deceased and All persons interested having been notified in accordance with the law and no objections being made thereto, it is decreed that Yvonne B. Janson of Fall River in the County of Bristol be appointed administratrix of said estate in this Commonwealth first giving bond with ——— sureties for the due performance of said trust.

New Bedford

Date August 27, 1986

/s/ [Illegible]
Judge of Probate Court

RELEASE DEED

I, HARVEY B. MONTOUR, JR., of Tiverton, Newport County, Rhode Island, for consideration paid, and in full consideration of FIVE THOUSAND ($5,000.00) DOLLARS

grant, convey, and assign to THOMAS F. COSTELLO, of 667 Horseneck Road, Westport, Bristol County, Massachusetts with *WARRANTY* COVENANTS

all of the right, title and interest which I now have or to which I may at any time in the future become entitled through inheritance, devise, gift or by operation of law, in and to the land together with all buildings and improvements thereon, situated in the Town of Westport, Bristol County, Massachusetts at 127I Pettey Lane, bounded and described as follows:

PARCEL ONE:

Beginning at the southwesterly corner of the granted premises at the corner of two stone walls, thence northerly on the west wall forty-four (44) feet to a stub, thence easterly one hundred sixty-two (162) feet and three (3) inches to a stub at a thirty (30) foot way, thence southerly on said thirty (30) foot way forty-four (44) feet to the south wall, thence westerly on the south wall one hundred sixty-five (165) feet and seven (7) inches to the point of beginning. Containing 7,210 square feet, more or less. Together with all rights of way appurtenant to said premises.

Being the same premises conveyed January 19, 1949 by David L. Pettey to Arthur J. Montour by deed recorded in Bristol County Registry of Deeds Southern District Book 957 Page 446.

PARCEL TWO:

Beginning at the northeasterly corner of parcel one as described above, thence along a forty (40) foot way forty-seven (47) feet to a corner, thence westerly one hundred fifty-eight (158) feet and nine (9) inches to a wall at a point forty-four (44) feet northerly of the north west corner of said parcel one; thence southerly to the north west corner of said parcel one; thence easterly on said parcel one one hundred sixty-two (162) feet and three (3) inches to the point of beginning. Containing 25.83 rods, more or less. Together with all rights of way appurtenant to said premises.

Being the same premises conveyed July 26, 1952 by David L. Pettey to Arthur J. Montour by deed recorded in Bristol County Registry of Deeds Southern District Book 1069 Page 120.

Parcel one and two are further described as being bounded northerly by land now or formerly of Patrick J. Murphy and Pamela A. Murphy; easterly by a way; southerly by land now or formerly of Susan A. Tuckerman, Trustee, Susan Tuckerman Trust; westerly by a way; see Lots 32 & 33 on Town of Westport Assessors Map 73.

For Grantor's title see estate of Arthur J. Montour, Bristol County Probate Docket No. 154664; and estate of Alma Montour, Bristol County Probate No. 86P1308-A1; and the estate of Maria Courchaine, late of Fall River, Massachusetts.

WITNESS my hand and seal this 30th day of March 1988.

/s/ Harvey B. Mountour, Jr.
HARVEY B. MONTOUR, JR.

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss: March 30, 1988

Then personally appeared the above-names Harvey B. Mountour, Jr., and acknowledged the foregoing instrument to be his free act and deed, before me.

/s/ [Illegible]
Notary Public

My Commission expires: 3/27/92

[Notary Seal]

[Commonwealth of Massachusetts Deeds & Excise Stamp]

Received & Recorded Mar. 30, 1988 at 3 hrs. 03 min. P.M.

Attest:

/s/ John Gomes
Register

January 26, 1988

Preston H. Hood, Jr., Esq.
HOOD & HOOD
26 Bedford Street POB 2546
Fall River, MA 02720

Yvonne B. Janson, Administratrix
Estate of Alma Montour
22 Norwood Street
Fall River, MA 02720

RE: Estate of Alma Montour
Bristol County Probate #86P1308-A1
Real Estate at 127I Pettey Lane, Westport, MA
Westport Assessors Map 73, Lots: 32 & 33.

Gentlemen/Madam;

On November 9, 1987, the Probate Court entered an Order that the minimum price shall be not less than $15,000.00 which was an increase from the original representation to this Court that the value of the one-seventh (1/7) interest was $10,000.00.

Attorney Preston Hood, Jr. telephoned and stated that he had an offer for $16,000.00 and asked if I would pay any more. I stated that I would pay $17,000.00 with the understanding that if anyone else offered more, I would be given the opportunity to increase my bid or offer.

I have not heard from Mr. Hood or his office to date and I am anxious to hear if my offer is acceptable, or if I can better another offer.

In order to foreclose the possibility that oral representations were made by me that "I went higher" or "I would not go higher"; all communications by me shall be in writting. I shall promptly respond to your instructions.

Enclosed is a copy of Judge Harvey's order that both the Administratrix *and* Counsel: "to notify Susan Tuckerman Costello to submit bid or offer."

I am confident that you will do everything necessary to obtain the best possible price for the Heirs of this Estate.

Respectfully submitted,

/s/ Susan Tuckerman Costello
SUSAN TUCKERMAN COSTELLO
667 Horseneck Road
Westport, MA 02790

CERTIFIED LETTER
RETURN RECEIPT
#P689 041 119
#P689 041 120

February 15, 1988

Preston H. Hood, Jr., Esq.
HOOD & HOOD
26 Bedford Street POB 2546
Fall River, MA 02720

Yvonne B. Janson, Administratrix
Estate of Alma Montour
22 Norwood Street
Fall River, MA 02720

RE: Estate of Alma Montour
Bristol County Probate #86P1308-A1
Real Estate at 127I Pettey Lane, Westport, MA
Westport Assessors Map 73, Lots 32 & 33.

Gentlemen/Madam;

On February 13, 1988 you telephoned my home and stated that you had an offer for $18,000.00 and spoke to my husband.

He explained to you and I will confirm that if you have an offer for $18,000 please so state in a letter to me; and then, by letter, I shall better that offer.

Again, I must insist that your communications with me must be in writing, as I stated in my letter to you of January 26, 1988, in order foreclose any misunderstandings.

I am confident that both you and Mrs Janson will comply with Judge Harvey's ORDER.

Respectfully submitted,

/s/ Susan Tuckerman Costello
SUSAN TUCKERMAN COSTELLO
667 Horseneck Road
Westport, MA 02790

CERTIFIED LETTER
RETURN RECEIPT
P689 041 121
P689 041 122

JOSEPH E. HANIFY, JR., P.C.
ATTORNEY AND COUNSELOR AT LAW
Suite 30 Buffiington Building
10 Purchase Street
Fall River, MASS. 02720

Area Code 617 679-6611

March 2, 1988

Ms. Susan Tuckerman Costello
667 Horseneck Road
Westport, MA 02790

RE: ESTATE OF ALMA MONTOUR

Dear Ms. Costello:

Attorney Preston H. Hood, Jr. has requested that I write to you and confirm the fact that there has been an offer of $18,000.00 for the share of the property in question.

Very truly yours,

/s/ Joseph E. Hanify, Jr.
JOSEPH E. HANIFY, JR.

JEH: j11

Certified letter
return receipt
P-546 575 283

March 5, 1988

Preston H. Hood, Jr., Esq.
HOOD & HOOD
26 Bedford Street, POB 2546
Fall River, MA 02720

Yvonne B. Janson, Administratrix
Estate of Alma Montour
22 Norwood Street
Fall River, MA 02720

RE: Estate of Alma Montour
Bristol County Probate #86P1308-A1
Real Estate at 127I Pettey Lane, Westport, MA
Westport Assessors Map 73, Lots: 32 & 33.

Gentlemen/Madam;

I a min receipt of a letter by Joseph E. Hanify, Jr. dated March 2, 1988.

While Mr. Hanify does represent Yvonne B. Janson, in an individual capacity, he does not represent Mrs. Janson as Administratrix of the Estate of Alma Montour.

I shall assume from Mr. Hanify's letter that he is acting for in in behalf of Preston H. Hood, J. and that the representations made by him in the letter of March 2, 1988 are true, if I do not hear from you to the contrary, in writing.

I will pay Nineteen Thousand ($19,000.00) Dollars for a good, clear, record title by quitclaim deed for the interest (1/7) of the Estate of Alma Montour in the above referenced real estate.

In order to foreclose the possibility that oral representations were made by me that "I went higher" or that "I would go higher"; all communications by me shall only be in writing. I shall promptly respond.

Respectfully submitted,

/s/

SUSAN TUCKERMAN COSTELLO
667 Horseneck Road
Westport, MA 02790

CERTIFIED LETTER
RETURN RECEIPT
#P689 041 123
#P 689 041 124

Encl: letter of 3/2/88.

Bk 2121 Pg. 284

I Yvonne B. Janson,—ADMINISTRATRIX of the ESTATE of—Alma Montour by power conferred by Bristol County Probate Court (Docket #86 P 1308-A1) License to Sell dated December 4, 1987 and every other power, for EIGHTEEN THOUSAND AND 00/100 ($18,000.00) Dollars paid, grant to Patrick J. Murphy and Pamela A. Murphy, husband and wife, as tenants by the entirety, of 127H Petty Lane, Westport, Massachusetts Two certain parcels of land in South Westport, Massachusetts between Horseneck Road and the east branch of the Westport River, more specifically bounded and described as follows:

PARCEL ONE: Beginning at the southwesterly corner of the granted premises at the corner of two stone walls, thence northerly on the west wall forty-four (44) feet to a stub, thence easterly one hundred sixty-two (162) feet and three (3) inches to a stub at a thirty foot way, thence southerly on said thirty foot way forty-four (44) feet to the south wall, thence westerly on the south wall one hundred sixty-five (165) feet and seven (7) inches to the point of beginning.

PARCEL TWO: Beginning at the northeasterly corner of other land of the grantee, thence along a 40 foot way forty-seven (47) feet to a corner thence westerly about one hundred fifty-eight (158) feet and nine (9) inches to a wall at a point 44 feet northerly of the northwest corner of said grantee's land; thence easterly on said grantee's land about one hundred sixty-two (162) feet and three (3) inches to the point of beginning; containing about 25 and 83/100 rods.

Together with all rights of way appurtenant to said premises.

Being the same premises conveyed to Arthur J. Montour by two deeds from David L. Pettey, dated respectively January 19, 1949 and July 20, 1952 and recorded with

Bristol County South District Registry of Deeds respectively in Book 1069 at Page 120 and in Book 1663 at Page 440.

See Bristol County Docket #154664 for the Estate of Arthur J. Montour who deceased February 27, 1972.

Witness my hand and seal this third day of March 1988

/s/ Joseph E. Hanify, Jr.

/s/ Yvonne B. Janson
YVONNE B. JANSON
Administratrix of the Estate of
Alma Montour

THE COMMONWEALTH OF MASSACHUSETTS

BRISTOL ss. March 3, 1988

Then personally appeared the above named Yvonne B. Janson, Administratrix and acknowledging the foregoing instrument to be her free act and deed, before me,

/s/ Joseph E. Hanify, Jr.
Notary Public

My commission expires
November 13, 1992

[Commonwealth of Massachusetts Deeds & Excise Stamp, Dated April 13, 1988]

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT

PROBATE COURT

ss.

BRISTOL

Equity No. 89-0019 G

YVONNE B. JANSON, ADMINISTRATRIX,
Plaintiff

vs.

PATRICK J. MURPHY and PAMELA A. MURPHY,
Defendants

PETITION FOR RECISSION OF DEED

[Filed Feb. 24, 1989]

1. Reference is made to Court Docket No. 86P1308-A1.

2. Plaintiff is the Administratrix of the Estate of Alma Montour.

3. Defendant received title to two parcels sited at 1271 Petty Lane, Westport, MA. by deed of the said Administratrix dated March 3, 1988 and recorded in the Bristol County Southern District Registry of Deeds at Book 2121, Page 284. See attached "Exhibit A".

3. Said transfer of title was authorized by the Honorable Court pursuant to a license to sell issued on November 9, 1987.

4. The Defendants bid the amount of eighteen thousand ($18,000.00) dollars for said realty.

5. Another individual, Susan Tuckerman Costello at 667 Horseneck Road, Westport, MA. submitted a bid of nine-

teen thousand ($19,000.00) dollars by way of a letter which was received at the Law Offices of Preston H. Hood, Jr., Esquire on March 5, 1988.

6. The subject realty was transferred to said Defendants in apparent error due to the higher bid which was timely submitted by said Costello.

7. As a result, the Plaintiff seeks to rescind the above-referred to deed (which was recorded on April 13, 1988 in the Registry of Deeds), and thereby to reopen the bidding by all interested parties for the subject realty.

WHEREFORE, the Plaintiff prays that the deed to the subject realty be rescinded and that the bidding for said realty be reopened.

Signed under the penalties of perjury this twenty-third day of February 1989.

/s/ Yvonne B. Janson
By Administratrix's Attorney

/s/ Joseph E. Hanify, Jr.
JOSEPH E. HANIFY, JR.
Esquire
10 Purchase Street
Fall River, MA 02720
508-679-6611
B.B.O. #219820

February 22, 1989

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT

BRISTOL, SS.

To Patrick J. Murphy and Pamela A. Murphy of Westport in said County

A petition in equity has been presented to said Court by Yvonne B. Janson, Administratrix of the estate of Alma Montour late of Manchester in the State of New Hampshire alleging that said defendants receive title to two parcels situated at 1271 Petty Lane, Westport, Mass. by deed dated March 3, 1988 and recorded in Bristol County Southern District Registry of Deeds at Book 2121, Page 284. Said realty was transferred to said defendants in apparent error due to the higher bid which was timely submitted by another individual.

Therefore, the plaintiff prays that the above referred deed be rescinded and that the bidding be re-opened to all interested parties in the subject realty.

If you desire to object thereto you or your attorney should file in said Court at Taunton a written appearance and answer or other legal pleading, within twenty days after the thirteenth day of April 1989, the return day of this citation.

Witness, ERNEST ROTENBERG, Esquire, First Judge of said court, this Third day of March 1989.

ROBERT E. PECK
Register

It is ordered that notice of said proceeding be given by delivering or mailing by registered or certified mail a copy of the foregoing citation, to all persons interested fourteen days at least before said return day; and, if service be made by registered or certified mail, unless it shall appear that all persons interested have received

actual notice, by publishing a copy thereof once in each week for three successive weeks in the The Chronicle a newspaper published in Dartmouth the last publication to be one day at least before said return day.

Witness, ERNEST ROTENBERG, Esquire, First Judge of said court, this Third day of March 1989.

ROBERT E. PECK
Register
———————,—19 .

I certify under the penalties of perjury that I have served the foregoing citation by MAILING AND PUBLISHING AS DIRECTED.

/s/ Joseph E. Hanify, Jr.

OFFICES OF
HOOD & HOOD
COUNSELLORS AT LAW

Preston H. Hood
Preston H. Hood, Jr.

Area Code 617
Tel. 679-1900 & 678-3500
Fall River Peoples Cooperative Bank Bldg.

26 Bedford Street
P.O. Box 2546
Fall River, Massachusetts 02722

March 17, 1989

Mr. Thomas F. Costello
667 Horseneck Road
Westport, MA 02790

RE: Equity Citation
Case No. 89E-0019G1

Dear Costello:

Enclosed please find a copy of the Equity Citation presented by Yvonne B. Janson, Administratrix of the Estate of Alma Montour.

Very truly yours,

/s/ Preston H. Hood, Jr.
PRESTON H. HOOD, JR.

PHHJr/bc

Enclosure

[Certified Domestic Return Receipt, Article Number P 981 409 267, Addressed to Mr. Thomas F. Costello and Dated Mar. 27, 1989, Omitted in Printing]

OFFICES OF
HOOD & HOOD
COUNSELLORS AT LAW

Preston H. Hood
Preston H. Hood, Jr.

Area Code 617
Tel. 679-1900 & 678-3500
Fall River Peoples Cooperative Bank Bldg.

26 Bedford Street
P.O. Box 2546
Fall River, Massachusetts 02722

March 28, 1989

Ms. Susan Tuckerman Costello
667 Horseneck Road
Westport, MA 02790

RE: Equity Citation
Case No. 89E-0019G1

Dear Ms. Costello:

Enclosed please find a copy of the Equity Citation presented by Yvonne B. Janson, Administratrix of the Estate of Alma Montour.

Very truly yours,

/s/ Preston H. Hood, Jr.
PRESTON H. HOOD, JR.

PHHJr/bc

Enclosure

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
#P 981 409 270

[Certified Domestic Return Receipt, Article Number P 981 409 270, Addressed to Ms. Susan Tuckerman Costello and Dated Apr. 3, 1989, Omitted in Printing]

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

PROBATE AND FAMILY COURT DEPT.
BRISTOL DIVISION

Document 89E0019-G1

Cross Reference #86P1308-G1

YVONNE B. JANSON, Administratrix,
Plaintiff/Petitioner

vs.

PATRICK J. MURPHY and PAMELA A. MURPHY,
Defendant

Counsel for Plaintiff: Joseph E. Hanify, Jr. Esquire.

Counsel for Defendant: Susan Tuckerman Costello, pro se & Thomas F. Costello, pro se.

Paper #	Date Filed	Date of Order		Disposition	Justice
1.	2-24-89		Complaint for Recission of Deed		
2.	3-3-89		Citation issued ret'ble April 13, 1989	ret'd	
3.	4-10-89		Appearance, Answer, Objection and Counterclaim by Thomas F. Costello, Susan Tuckerman Costello and Sunswick Farm Corp.		
4.	4-10-89		App'r by Susan Tuckerman Costello, pro se for Sunswick Farm Corp. Filed		
5.	4-10-89		App'r by Susan Tuckerman Costello, pro se Filed		
6.	4-10-89		App'r by Thomas F. Costello, Pro se Filed		
7.	4-10-89		Motion for Partial Summary Judgment by Thomas F. Costello Filed		
8.	4-24-89		Notice of Taking Oral Deposition of Preston H. Hood, Jr. and Joseph E. Hanify, Jr. by Thomas F. Costello Filed		

A.C. 126

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT

BRISTOL, ss.

No. 89E0019-G1

Equity petition

IN THE MATTER OF YVONNE B. JANOSN

v.

MURPHY *et alia*

TO THE REGISTER

Enter my appearance for

Susan Tuckerman Costello, pro se
667 Horseneck Road
Westport, MA 07290
Tel: (508) 636-6825

/s/ Susan T. Costello

Filed Apr. 10, 1989

/s/ Robert E. Peck
Register

A.C. 126

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT

BRISTOL, ss.

No. 89E0019-G1

Equity

IN THE MATTER OF YVONNE B. JANSON, ADMX.

vs.

PATRICK J. MURPHY *et al.*

TO THE REGISTER

Enter my appearance for

Thomas F. Costello
667 Horseneck Road
Westport, MA 02790
(508) 636-6825

/s/ Thomas F. Costello pro se

Filed April 10, 1989

/s/ Robert E. Peck
Register

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT

BRISTOL, ss:

Equity No. 89E0019G1

YVONNE B. JANSON, ADMINISTRATRIX
Plaintiff

vs.

PATRICK J. MURPHY AND PAMELA A. MURPHY,
Defendants

ANSWER OF DEFENDANTS

[Filed Apr. 24, 1989]

Now comes the Defendants, Patrick J. Murphy and Pamela A. Murphy, and answer the petition/complaint of the Plaintiff as follows:

1. No answer required.

2. The Defendants admit the allegations of paragraph 2 of the petition.

3. Defendants admit the allegations of the first paragraph numbered 3 in the petition.

4. Defendants admit the allegations contained in the second paragraph numbered 3 in the petition.

5. Defendants admit the allegations of paragraph 4 of the petition.

6. Defendants admit the allegations of paragraph 5 of the petition.

7. The Defendants deny the allegations set forth in paragraph 6 of the petition, and further state that said transfer was made to them in accordance with the Order of the Court referred to above.

8. Defendants deny the allegations and object to the request contained in paragraph 7 of the petition.

9. Defendants further state their willingness to match the higher bid received by the Plaintiff for the property which is the subject matter of this petition.

WHEREFORE, the Defendants pray that this Honorable Court ratify and confirm the transfer of the interest of the Plaintiff's decedent in the parcels known as and numbered 127I Pettey Lane, Westport, Massachusetts, upon condition that they pay the additional sum of $1,000.00 to the Plaintiff, thereby making the Plaintiff and the Estate which she represents whole.

By their attorneys,

SHERWIN, GOTTLIEB & LOWENSTEIN

/s/ Benjamin M. Gottlieb
BENJAMIN M. GOTTLIEB
P.O. Box 2700
84 North Main Street
Fall River, MA 02722
(508) 673-5851
BBO #204860

April 21, 1989

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT
PROBATE AND FAMILY COURT

BRISTOL, ss:

No. 89E0019-G2

YVONNE B. JANSON, ADMINISTRATRIX
OF THE ESTATE OF ALMA MONTOUR,
Plaintiff

v.

PATRICK J. MURPHY, PAMELA A. MURPHY, THOMAS F. COSTELLO, SUSAN TUCKERMAN COSTELLO, SUNSWICK FARM CORPORATION,
Defendants

v.

YVONNE B. JANSON, ADMINISTRATRIX OF THE ESTATE OF MARIA COURCHAINE, YVONNE B. JANSON, INDIVIDUALLY, PRESTON H. HOOD, JR., JOSEPH E. HANIFY, JR., JOSEPH A.P. MONTOUR, ADMINISTRATOR OF THE ESTATE OF ARMAND P. MONTOUR, FOSTER R. HERMAN,
Third-Party Defendants

NOTICE OF APPEAL

(6-19-89 Order)

Notice is hereby given that Thomas F. Costello, the above named defendant, hereby appeals to the Appeals Court from the Order/Final Judgment that: "The appearance of Thomas F. Costello and any and all pleadings that he may have filed be stricken from the record, with prejudice, on the grounds that he is not an attorney"; entered June 19, 1989. Notice of the Court's action,

above, *was not* given to Costello by any party or by the Court.

/s/ Thomas F. Costello
THOMAS F. COSTELLO
667 Horseneck Road
Westport, MA 02790
Tel: (508) 636-6825

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT
PROBATE AND FAMILY COURT

BRISTOL, ss:

No. 89E0019-G1

YVONNE B. JANSON, ADMINISTRATRIX
OF THE ESTATE OF ALMA MONTOUR,
Petitioner

v.

PATRICK J. MURPHY, PAMELA A. MURPHY, THOMAS F. COSTELLO, SUSAN TUCKERMAN COSTELLO, SUNSWICK FARM CORPORATION, *Respondants*

v.

YVONNE B. JANSON, ADMINISTRATRIX OF THE ESTATE OF MARIA COURCHAINE, YVONNE B. JANSON, INDIVIDUALLY, PRESTON H. HOOD, JR., JOSEPH E. HANIFY, JR., JOSEPH A.P. MONTOUR, ADMINISTRATOR OF THE ESTATE OF ARMAND P. MONTOUR and FOSTER R. HERMAN,
Third-Party Defendants

NOTICE OF APPEAL

[Filed Jul. 28, 1989]

Notice is hereby given that the respondant, Thomas F. Costello, appeals to the Appeals Court the Judgment dismissing the petition for recision of the deed for failure to state a claim upon which relief can be granted, dated and entered July 21, 1989.

/s/ Thomas F. Costello
THOMAS F. COSTELLO
667 Horseneck Road
Westport, MA 02790
Tel: (508) 636-6825

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT
PROBATE AND FAMILY COURT

BRISTOL, ss:

No. 89E0019-G1

YVONNE B. JANSON, ADMINISTRATRIX OF THE ESTATE OF ALMA MONTOUR,
Petitioner

v.

PATRICK J. MURPHY, PAMELA A. MURPHY, THOMAS F. COSTELLO, SUSAN TUCKERMAN COSTELLO, SUNSWICK FARM CORPORATION,
Respondants

v.

YVONNE B. JANSON, ADMINISTRATRIX OF THE ESTATE OF MARIA COURCHAINE, YVONNE B. JANSON, INDIVIDUALLY, PRESTON H. HOOD, JR., JOSEPH E. HANIFY, JR., JOSEPH A.P. MONTOUR, ADMINISTRATOR OF THE ESTATE OF ARMAND P. MONTOUR and FOSTER R. HERMAN,
Third-Party Defendants

NOTICE OF APPEAL

[Filed Jul. 28, 1989]

Notice is hereby given that the respondant, Susan Tuckerman Costello appeals to the Appeals Court the Judgment dismissing the petition for recision for failure to state a claim upon which relief can be granted, dated and entered July 21, 1989.

/s/ Susan Tuckerman Costello
SUSAN TUCKERMAN COSTELLO
667 Horseneck Road
Westport, MA 02790
Tel: (508) 636-6825

A.C. 118

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT DEPARTMENT

86P1308-A1

Jan. 23, 1992

TO THE HONORABLE THE JUDGES OF THE PROBATE COURT IN AND FOR THE COUNTY OF BRISTOL:

In the matter of Alma Montour Estate 86P1308-A1 of Manchester, NH in the County of Hillsborough Now comes Thomas F. Costello and says that he has purchased by warranty deed the interests of sixty (60.0%) percent of the heirs of this Estate; there was a purported sale for $18,000.00 and the Court Ordered Murphy to pay another $1,000.; funds were paid to the other heirs and moves Preston H. Hood, Jr., forthwith, pay Thomas F. Costello, without prior endorsement or condition, $11,400.00 plus interest.

By: /s/ Thomas F. Costello
THOMAS F. COSTELLO

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT

BRISTOL, SS.

After hearing, it is hereby ordered that the above motion is hereby—denied.

/s/ Edward F. Casey
Judge of Probate Court

March 16, 1992.

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT

Rule 30 Deposition

Bristol, ss.

Nos. 86P1308-A1,
86P1289-A1,
89E0019-G1

YVONNE B. JANSON, ADMINISTRATRIX

-vs-

PATRICK J. MURPHY, *et al*

-vs-

PRESTON H. HOOD, JR.

[Filed Oct. 5, 1989]

DEPOSITION of PRESTON H. HOOD, JR., taken pursuant to Rule 30 of the Massachusetts Rules of Civil Procedure on behalf of the Assignee, before Wendy Atella, at the Taunton Probate Court, Taunton, MA, commencing at 11:00 AM, on Thursday, September 14, 1989, pursuant to agreement of parties as to the date and time of taking said deposition.

APPEARANCES:

Charles Desmarais, Esquire
446 County Street
New Bedford, MA 02740
Representing Preston H. Hood, Jr., Esq.
and Joseph E. Hanify, Jr., Esq.

Joseph E. Hanify, Jr. Esq.
10 Purchase Street
Fall River, MA 02720
Representing Yvonne B. Janson

Thomas F. Costello
667 Horseneck Road
Westport, MA 02790
Representing Self

[1] (September 14, 1989, Thursday, 11:00 AM)

PRESTON H. HOOD, JR., ESQ., a witness called on behalf of the Assignee, having been duly sworn on oath, deposes and says as follows:

DIRECT EXAMINATION

Q (By Mr. Costello) Mr. Hood, would you identify yourself?

A I am Attorney Preston H. Hood, Jr. My office is at 26 Bedford Street, Fall River, Massachusetts. I am the attorney for the Estate of Alma Montour and the Estate of Maria Courchaine.

* * * *

[6] Q And are you familiar with the order that was entered by Judge Harvey when that hearing was held on that license?

A Yes, I am.

Q Are you familiar with the order that he entered?

A Yes, I am.

Q Did that order say, "Administratrix and Counsel to notify Susan Tuckerman Costello to submit bid or offer?

* * * *

[7] A Correct.

Q Is that what the Judge ordered?

A Yes.

* * * *

[9] Q Did you advise her, by the way, that she had to comply with the order by Judge Harvey in that she

had to notify Susan Tuckerman Costello to make a better offer?

A No.

* * * *

[10] Q Did you advise her that she had to?

A No.

Q Did the order say that she had to?

A Yes, it did.

Q You didn't advise her to?

A No.

Q That's all I want to hear. On the March 5 letter, did you receive the March 5 letter on March 7?

A My office received it, yes.

Q On March 7?

A On March 7, correct.

Q And in that letter was a bid for $19,000?

A Yes, it was.

Q And you received it?

A It came to my office on the 7th of March; that's right.

* * * *

[15] Q The deed from Yvonne Janson as administratrix of the Estate of Alma Montour recorded in Book 2121, Page 284, did you prepare that deed?

A Yes, I did.

Q What is the consideration that's shown on that deed?

A Consideration that's shown on the deed is 18,000.

Q Is that what you received?

A That is what I received, yes.

Q And the deed from Yvonne Janson, Administratrix of the Estate of Maria Courchaine recorded in Book 2121, Page 288; is that a true copy of the deed?

A Yes, it is.

Q Did you prepare it?

A Yes, I did.

Q What was the consideration for that deed?

A $10,000.

Q Then there is a deed recorded in Book 2121, Page 287 from Yvonne Janson individually. Did you prepare that deed?

A Yes, I did.

Q And what is the consideration for that deed?

A $10,000

Q Is the property that is decribed in each one [16] of these deeds identical?

A The property described is identical.

Q Is it an identical one-seventh interest?

A Each one of the deeds conveys a one-seventh interest.

Q So they are equal in description?

A Correct.

Q In every way?

A Yes.

Q And you recorded these deeds?

A Yes, I did.

Q And what date did you record them?

A April 13.

Q And where did you record them?

A In New Bedford Registry of Deeds.

Q And who was present there at that recording, just you?

A Yeah. I went alone.

Q There was no one else there?

A No.

Q So, you prepared these deeds and you went to the Registry alone and recorded them?

A Yes.

* * * *

[18] Q No, no, just answer the question. Who were you representing at the Registry on April 13 when you recorded these three deeds?

A I was representing the two estates and Mrs. Janson, I guess.

Q You guess or were you?

A Well—

Q Please, who were you representing?

A I was representing—let's change the whole answer.

Q No, no, you have to answer my question. Who were you representing on April 13 when you were recording these instruments at the Bristol County Registry of Deeds, Southern District? I just want the names.

A The two estates.

Q Which two estates?

A Alma Montour and Maria Courchaine.

[19] Q Were you representing anyone else?

A No.

Q You were not representing Yvonne Janson?

A No.

Q Were you representing Patrick J. Murphy and Pamela A. Murphy?

A No.

Q Was anyone else there representing Yvonne Janson?

A No.

Q Was anyone else there representing Pamela A. Murphy or Patrick J. Murphy?

A No.

* * * *

[31] Q Who were you representing when you prepared that deed?

A I was—Mr. Murphy—

Q No, no, who were you representing when you prepared that deed for those four people to sign? Who were you representing?

A Patrick Murphy.

Q You were representing Patrick Murphy in the spring of 1988?

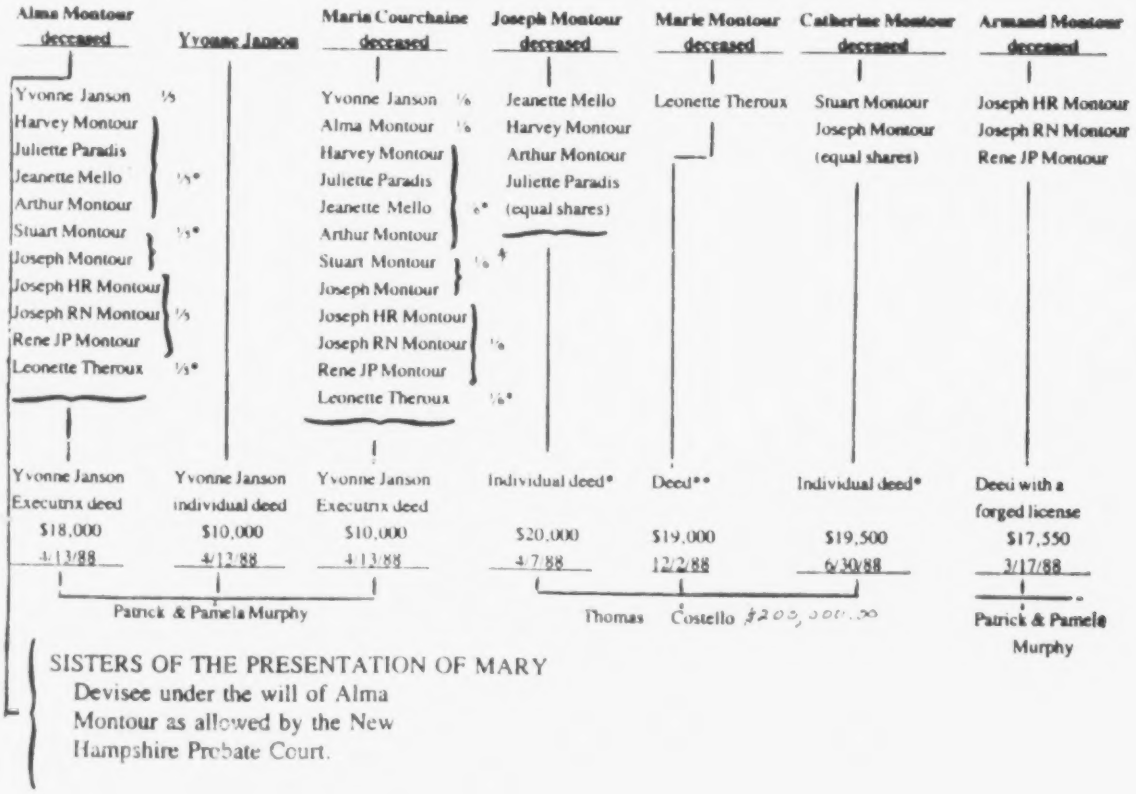
A Yes.

[45] Q Who did you represent in the spring of 1988 when you prepared the deed for $10,000 for Jeannette Mello, Harvey B. Montour, Jr., Juliette Paradis, and Arthur E. Montour?

A Um, I was preparing the Murphy's.

BEST AVAILABLE COPY

ESTATE OF ARTHUR J. MONTOUR



* shares purchased by Thomas Costello

FILED
NOV 12 1992
OFFICE OF THE CLERK

No. 91-1701

In The

Supreme Court of the United States

October Term, 1991

THOMAS COSTELLO and SUSAN TUCKERMAN COSTELLO,

Petitioners,

vs.

YVONNE B. JANSON, ADMINISTRATRIX ESTATE OF ALMA MONTOUR and PATRICK J. MURPHY, *et ux.*,

Respondents.

On Petition for Writ of Certiorari to the Appeals Court of Massachusetts

BRIEF IN OPPOSITION FOR RESPONDENT YVONNE B. JANSON, ADMINISTRATRIX

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QUESTIONS PRESENTED

1. Whether a person, not a named party or an intervenor in an action, has standing to appeal.

2. Whether a court may convert a motion to dismiss into a motion for summary judgment.

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Respondents.

On Petition for Writ of Certiorari to the Appeals Court of Massachusetts

BRIEF FOR RESPONDENT YVONNE B. JANSON, ADMINISTRATRIX

STATEMENT OF THE CASE

The petition submitted by Thomas Costello and Susan Tuckerman Costello requests a review of a judgment entered by

the Appeals Court of the Commonwealth of Massachusetts, (App. 2a, 1b, 2b, 3b) which affirmed judgments of the Bristol Massachusetts Probate and Family Court, and a judgment of the Supreme Judicial Court of the Commonwealth denying further appellate review (App. 1a).

The lower court action from which the Costellos brought appeals before the Appeals Court of the Commonwealth of Massachusetts is entitled *Yvonne B. Janson, Administratrix of the Estate of Alma Montour v. Patrick J. Murphy and Pamela A. Murphy*, a Petition for Rescission of Deed, Bristol Probate and Family Court No. 89-0019-G1 (App. 19a).

The above action arose from a dispute as to ownership of a one-seventh interest in two adjacent parcels of realty located in Westport, Massachusetts.

The title to the two parcels are derived through the estates of Arthur Montour and his heirs. Yvonne B. Janson, an heir of Arthur Montour, requested that Joseph E. Hanify, Jr., Esquire, research the title to the two parcels. Hanify subsequently retained Preston H. Hood, Jr., Esquire, to complete the research. Hood's research indicated that there were seven shares in the two parcels. One share was held by the estate of Alma Montour, said estate not having been probated.

On July 16, 1986, Hood filed a petition for probate in the estate of Alma Montour with the Briston Probate and Family Court. Yvonne B. Janson was appointed administratrix (App. 6a). On July 7, 1987, Hood filed a petition for sale of real estate for ten thousand dollars ($10,000), said real estate being comprised of the aforementioned one-seventh share in the two parcels of realty. Prior to this date, Patrick J. Murphy, an abuttor to the parcels, had indicated to Hood that he would pay ten thousand dollars ($10,000) for any share that became available for purchase.

No other offers were made to Hood prior to the petition for the license to sell, although the Costellos presently claim an offer of fifteen thousand dollars ($15,000) was made by Susan Tuckerman Costello during that time period. Publication of the citation for the license to sell was made, and on the return date, Thomas Costello appeared at court, attempted to file an appearance for his wife, Susan A. Tuckerman, and indicated to the court that his wife would pay fifteen thousand dollars ($15,000) for the Alma Montour share. The Costellos were not heirs, legatees, or creditors of the estate of Alma Montour, but merely abuttors, as were the Murphys. The court, Harvey J., struck the appearance of Susan A. Tuckerman, as she was not a party in interest in the estate of Alma Montour, but instructed Hood that she be notified to submit a bid or offer on the one-seventh interest. The license to sell issued for fifteen thousand dollars ($15,000) on December 4, 1987.

In accordance with the order of Judge Harvey, bids were received by Hood for the one-seventh share in the estate of Alma Montour. Eventurally the share was sold to Patrick J. Murphy and Pamela A. Murphy for eighteen thousand dollars ($18,000), when a bid of nineteen thousand dollars ($19,000) had been made by Susan Tuckerman Costello, said bid having been mailed to Hood's office while he was on vacation. On his return from vacation the bid was not brought to his attention. Janson conveyed the Montour interest to the Murphys by a deed signed on March 3, 1988. In October 1988, Costello informed Hood that his wife had outbid the Murphys, and therefore, the share in the estate of Alma Montour had not been conveyed to the highest bidder.

On February 24, 1989, Hanify filed a petition for rescission of a deed, Bristol Probate and Family Court No. 89E0019-G1, Janson as petitioner, and the Murphys as respondents (App. 19a). The Costellos have presently claimed that the petition for rescission was filed pursuant to Mass. G.L. Chapter 204, § 24, which allows

interested parties to request the court confirm or ratify acts of an administratrix. The ratification of the conveyance was not the basis for the petition filed by Hanify. Rather, Janson and Hood were admitting to the court that the highest bid had been overlooked, and were requesting rescission, not ratification. The Costellos were not made a party to this petition and were not named in the citation which issued from the court.

As a courtesy to Susan Tuckerman Costello as a prior bidder, and to keep Thomas Costello informed, Hood mailed each of them, individually, a copy of the citation issued in the action. The Costellos claim this mailing constitutes service on them and therefore bestows on them the status of parties.

Although not named parties or intervenors, the Costellos and Sunswick Farm Corporation, their Delaware corporation, on April 10, 1989, filed an appearance, answer, objection and counterclaim in *Janson v. Murphy*. Then the Costellos, on April 13, 1988, filed a third party complaint entitled: Yvonne B. Janson, Administratrix of the Estate of Alma Montour, Petitioner v. Patrick J. Murphy, Pamela A. Murphy, Thomas F. Costello, Susan Tuckerman Costello, Sunswick Farm Corporation, Respondents v. Yvonne B. Janson, Administratrix of the Estate of Maria Courchaine, Yvonne B. Janson, Individually, Preston H. Hood, Jr., Joseph E. Hanify, Jr., Joseph A.P. Montour, Administrator of the Estate of Armand P. Montour and Foster R. Herman, Third Party Defendants. This action was given a docket number of 89E0019-G2 by a probate court clerk. The court refused to issue a citation and no defendants were served, or answered the complaint. The Costellos have claimed that by filing these pleadings, they have become respondents in the petition for rescission of deed. In fact, the Costellos in their notice of appeal used the docket number of *Janson v. Murphy, et al.*, No. 89E0019-G1, but the caption from their third party complaint (App. 33a). It is from the following orders and positions of the court in the petition for

rescission of deed, *Janson v. Murphy, et al.*, No. 89E0019-G1 that the Costellos claimed the right of appeal.

1. On May 26, 1989, the court, La Staiti, J. ordered a hearing on Thomas Costello's status, and as a part of said order took the position that Thomas Costello, Susan Tuckerman Costello, and Sunswick Farm Corporation were not proper parties to the action. Thomas Costello was allowed to participate in this hearing. Thomas Costello and Susan Tuckerman Costello appealed this order.

2. A motion to strike appearance of Thomas Costello was allowed by the court, La Staiti, J., on June 19, 1989. Thomas Costello, as an individual, appealed.

3. On June 15, 1989, a lengthy hearing was held before La Staiti, J. Testimony was presented by the parties and received by the court; Costello was allowed to participate in the hearing and cross-examine. During the hearing it became clear to the court that the petition for rescission of a deed did not state a claim under Massachusetts law. The court indicated that the Murphys should file a motion to dismiss under Massachusetts Rules of Civil Procedures, Rule 12(b), for failure of the complaint to state a claim under which relief can be granted. The Murphys filed such a motion with a brief in which they requested the court to convert the motion to dismiss into a motion for summary judgment. On July 21, 1989, the court, La Staiti, J., treating the motion to dismiss as a motion for summary judgment, granted judgment in favor of the defendants Murphys (App. 4a, 5a). On July 28, 1989, the Costellos as "respondents" filed a notice of appeal (App. 3a).

The issues for determination before the Appeals Court of the Commonwealth of Massachusetts were issues (1) of the Costellos' standing in an action where they were not named parties,

or intervenors, and (2) the treatment of the motion to dismiss as a motion for summary judgment and the subsequent allowance of said motion.

Therefore any other alleged issues raised by the Costellos' petition for a writ are not properly before the Court.

REASONS FOR DENYING THE WRIT

I.

THOMAS J. COSTELLO WAS NOT DENIED AN OPPORTUNITY TO BE HEARD.

Thomas Costello, as an individual, at all times was allowed to participate in hearings before the Bristol Probate and Family Court in the action entitled Yvonne B. Janson, Administratrix v. Patrick J. Murphy and Pamela A. Murphy, No. 89E0019-G1. Costello was allowed to cross-examine witnesses and to present oral arguments. The court allowed this participation although Costello was not a named party or an intervenor. It was subsequent to his appearances before the court that the court ruled that the Costellos had no standing. The argument propounded by Costello that he was denied an opportunity to speak because he was not an attorney is ludicrous. The lower court was more than accommodating to Thomas Costello as a pro se litigant. He was simply not allowed to represent his wife who did not appear in person, or Sunswick Farm Corporation which was not represented by counsel.

II.

THE COSTELLOS HAD NO STANDING TO PROSECUTE AN APPEAL.

It is clear from a reading of the face of the petition for rescission of a deed that the Costellos are not named parties, nor were they named in the citation issued by the court. No amended complaint was filed, nor did the Murphys ever file a third party complaint naming the Costellos as respondents. Massachusetts Rules of Civil Procedures, Rule 24, *Intervention,* provides the proper mechanism by which a person may protect their interest when not a named party. Although the court, La Staiti, J., suggested to Costello that he file a motion to intervene, Costello refrained from doing so. At no time did the Costellos have any interest in the petition for rescission of a deed different in kind from the general public. At all times they were strangers to the action and as such had no legal interest in the claim asserted. *D.J. Doyle v. Darden*, 328 Mass. 288 (1952).

Further, the General Laws of the Commonwealth state that only a person aggrieved by an order or judgment of the Probate Court may appeal to the Appeals Court. Massachusetts General Law, Chapter- 215, Section 9. It is well settled law in the Commonwealth that a person aggrieved is one who has some pecuniary interest, some personal right or some duty to act with respect to the judgement or order of the court. *First Christian Church v. Brownell*, 332 Mass. 143, 147 (1955); *Monroe v. Cooper*, 235 Mass. 33, 34 (1920); *Lawless v. Regan*, 128 Mass. 592, 593 (1880).

In fact, the court in *Lawless* stated that it, ". . . would greatly obstruct and delay the proceedings of the probate court if persons having no legal interest in the result . . . could be permitted to appeal from the decrees of the court." *Id.* at 594.

The Costellos had no interest or legal right different from any other person, and therefore are not persons aggrieved so as to have a right to appeal the orders and judgment of the probate court. *Bolster v. Atorney General*, 306 Mass. 387, 389 (1940).

III.

THE PROBATE COURT WAS CORRECT IN CONVERTING A MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT.

A motion to dismiss for failure to state a claim is not waived if not included in an answer, but may be made in any pleading. Massachusetts Rules of Civil Procedure, Rule 12(h)(2).

The filing by the Murphys of a motion to dismiss for failure to state a claim after a hearing before the court was proper. A motion to dismiss shall be treated as a motion for summary judgment if matters outside the pleadings are presented to the court. Massachusetts Rules of Civil Procedure, Rule 12(b). At the June 15, 1989 hearing, lengthy testimony was received by the court. Thomas Costello was present and was permitted to cross-examine and present whatever representations he wished to the court. Having heard matters outside of the pleadings, the court was compelled by Rule 12(b) to treat the motion as a motion for summary judgment.

CONCLUSION

There has been no denial of the Costellos' rights under the United States Constitution, Amendment XIV. The courts at all levels have afforded the Costellos the opportunity to present their claim of ownerhsip of a one-seventh interest in two parcels of property formerly held by the estate of Alma Montour, said interest having been conveyed to the Murphys.

In the most basic terms, the writ should be denied as all appeals pursued by the Costellos are from judgments and orders in an action in which they were not parties, intervenors, interested persons or persons aggrieved, and therefore, lacked standing to bring any appeal.

Respectfully submitted,

PATRICIA A. HARRINGTON
DESMARAIS, HARRINGTON &
FITZGERALD, P.C.
Attorneys for Respondent
Yvonne B. Janson, Administratrix